

BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAVIER BADILLO,

Claimant,

vs.

ROCK RIVER JERSEYS, LLC,

Employer,

and

HASTINGS MUTUAL INSURANCE
COMPANY,

Insurance Carrier,

and

SECOND INJURY FUND OF IOWA,

Defendants.

File No. 5064426

ARBITRATION

DECISION

Head Note Nos.: 1402.20, 1402.40,
1402.60, 1802, 1803, 1803.1, 2907, 3202

Claimant Javier Badillo filed a petition in arbitration on July 13, 2018, alleging he sustained an injury to his left eye while working for the defendant Rock River Jerseys, LLC ("Rock River"), on January 31, 2018. Badillo also named the Second Injury Fund of Iowa ("Fund") as a defendant, claiming he sustained a first loss to his right lower extremity in 1989 and 1990. The Fund filed an answer on August 2, 2018, and Rock River and its insurer, the defendant, Hastings Mutual Insurance Company ("Hastings"), filed an answer on August 3, 2018.

An arbitration hearing was held at Iowa Workforce Development in Sioux City, Iowa, on July 29, 2019. Prior to the hearing there was difficulty in obtaining a court reporter for the hearing. Rock River and Hastings secured Midwest Reporters, Inc. from Topeka, Kansas and the hearing was reported telephonically. Attorney Thomas Drew represented Badillo. Badillo appeared and testified. Pedro Ruiz-Lopez was present during the hearing with Badillo, but did not testify. Brett Kirkland with Rock River was called as a witness by Badillo. Piep Koene provided Spanish interpretation services during the hearing. Attorney Sara Lamme represented Rock River and Hastings. Assistant Attorney General Meredith Cooney represented the Fund. Joint Exhibits ("JE") 1 through 4, and Exhibits 1 through 6 and A through L were admitted into the record. The record was held open through October 11, 2019, for the receipt of post-hearing briefs and a copy of the transcript from the out-of-state court reporter. The briefs were timely received, but the transcript was not. On November 26, 2019, an Order to File Transcript was issued, reopening the record until December 6, 2019, for

the filing of the transcript. Rock River and Hastings filed the transcript and the record was closed. During the hearing Badillo raised a constitutional claim. Badillo expressly abandoned that claim in his post-hearing brief.

At the start of the hearing the parties submitted a hearing report, listing stipulations and issues to be decided, Rock River, Hastings, and the Fund waived all affirmative defenses.

STIPULATIONS

1. An employer-employee relationship existed between Rock River and Badillo at the time of the alleged injury.
2. Badillo sustained an injury on January 31, 2018, which arose out of and in the course of his employment with Rock River.
3. The alleged injury is a cause of temporary disability during a period of recovery.
4. The alleged injury is a cause of permanent disability.
5. At the time of the alleged injury Badillo's gross earnings were \$315.07 per week, he was married and entitled to five exemptions, and the parties believe the weekly rate is \$229.53.

ISSUES

1. Is Badillo entitled to temporary disability benefits from January 31, 2018 through June 11, 2018?
2. What is the nature of the disability; has Badillo sustained a scheduled member or an industrial disability?
3. What is the extent of disability?
4. What is the commencement date for permanent partial disability benefits, if any are awarded?
5. Is Badillo entitled to recover the cost of an independent medical examination under Iowa Code section 85.39?
6. Are Rock River and Hastings entitled to a credit of 53.7 weeks of compensation at the rate of \$242.64 per week?
7. Is Badillo entitled to benefits through the Fund?
8. Should costs be awarded Badillo?

FINDINGS OF FACT

Badillo was born in Mexico. (Transcript, page 21) Badillo left school after the first grade to support his family in Mexico. (Tr., p. 20) Badillo's ability to speak English is limited. (Tr., p. 21) Badillo cannot read or write in English or Spanish, but he understands directions in English. (Tr., pp. 23-24) Badillo is right-hand dominant. (Tr., p. 59) At the time of the hearing Badillo was thirty-seven. (Tr., p. 20)

Badillo moved to the United States in 2006 and he returned to Mexico in 2009. (Tr., pp. 21, 57) On July 25, 2011, Badillo returned to the United States. (Tr., p. 57) During the periods Badillo lived in Mexico he worked as a mason. (Tr., p. 58) Badillo worked for businesses and he was self-employed. (Tr., p. 58) As a mason in Mexico, Badillo worked with bricks, stones, cement, and wire, and also performed excavating. (Tr., pp. 58-59) Badillo used a trowel and grabbed stones, bricks, and blocks with both of his hands while working as a mason. (Tr., p. 59)

Badillo performed concrete work for Wren's Concrete from 2011 until 2018, when he went to Vander Pol. (Tr., pp. 57-58) Badillo's duties for Vander Pol are similar to the duties he performed for Wren's Concrete. (Tr., p. 60) Badillo worked with cement, checked the height levels, excavated, and used a skid loader. (Tr., pp. 59-60)

Rock River hired Badillo in January 2018 when Badillo was on a break from his concrete job with Wren's Concrete. (Exhibit I, p. 8; Tr., p. 42) Badillo admitted his job was temporary, but denied he had only been hired to band tires for one week. (Tr., p. 42) Badillo reported he was paid \$14.00 per hour. (Tr., p. 25) Badillo alleges Rock River had him do "a little bit of everything," including working with animals. (Tr., pp. 25, 42) Badillo testified in addition to working on the tires he cut alfalfa bales, assisted in "bringing the alfalfa bales, the silage and other bales," assisted in "getting the food ready," and "helping out with a little bit of everything." (Tr., p. 42) Badillo reported he worked for Rock River for three weeks. (Tr., p. 43)

Kirkland is the managing partner of Rock River. (Tr., p. 72) Rock River runs a calf department, maternity department, cropping enterprise, and a feeding enterprise. (Tr., p. 72) Kirkland testified Rock River hired Badillo and some other individuals to work for five to seven days to band a pile of tires for storage. (Tr., p. 74) Kirkland testified Badillo did not work on different tasks for Rock River. (Tr., p. 79) Kirkland denied Badillo took care of the animals, worked with alfalfa, or fed the animals, reporting he was hired only to band tires. (Tr., p. 79) Kirkland testified Badillo was hired as contract labor and he was paid \$13.00 per hour and worked thirty-two hours total. (Tr., p. 80)

Kirkland explained the tires Badillo worked with were actually sidewalls of tires. (Tr., p. 82) Badillo and his coworkers stacked up thirty tires and banded the tires together with a band cincher. (Tr., p. 82) Each set of thirty tires had three bands around it. (Tr., p. 82) To cinch the tires, Badillo used his hands. (Tr., p. 82) Badillo did not inform Rock River he could not physically perform the job. (Tr., p. 82)

On January 31, 2018, Badillo was stacking tires for Rock River when a band or wire broke hitting his left eye and causing him to feel pain and water in his eye. (Tr., p. 26) Badillo was taken for emergency medical treatment after his injury. (JE 1, p. 1) In the emergency room Badillo reported he had been struck in the left eye with a metal band, and he complained of pain and visual changes. (JE 1, p. 1) Badillo underwent a computerized tomography scan of the facial bones, which the reviewing radiologist found showed a displaced lens of the left globe, but no fractures. (JE 1, p. 4) Denise Greene, M.D., examined Badillo and assessed him with an anterior dislocation of the lens of the left eye, and she restricted Badillo from working. (JE 1, pp. 2, 5)

The date of the injury, Brandon Baartman, M.D., an ophthalmologist, examined Badillo and recommended an emergency left eye repair of a corneal laceration with uveal prolapse. (JE 2, p. 1) Dr. Baartman performed a left eye repair of corneal laceration and listed a post-surgery diagnosis of corneal/scleral laceration with uveal prolapse. (JE 2, p. 1)

Badillo received follow-up care with Vance Thompson Vision. Badillo complained his left eye was very itchy and watery, and he was experiencing problems with light sensitivity and headaches. (JE 3, pp. 1-4)

On February 26, 2018, Badillo returned to Dr. Baartman for additional surgery. (JE 2, p. 5) Dr. Baartman performed a left eye anterior vitrectomy with lens removal and insertion of an intraocular lens. (JE 2, p. 5) On March 2, 2018, Dr. Baartman released Badillo to return to work without restrictions on March 6, 2018. (JE 3, p. 5)

On March 6, 2018, a representative for Rock River and Hastings sent Badillo a letter notifying him that his physician had returned him to full duty effective March 6, 2018, and under Iowa law his temporary benefits had been terminated. (Ex. D, p. 1) The letter informed Badillo he had the right to submit any evidence or documents disputing or contradicting the reasons given for the termination. (Ex. D, p. 1)

Badillo returned to Vance Thompson Vision on March 7, 2018, complaining of blurry vision and headaches. (JE 3, p. 6) Dr. Baartman issued a letter on March 7, 2018, noting Badillo could return to work and "may need glasses or contact lenses in the future, also safety glasses advised." (JE 3, p. 8)

Badillo reported he went back to Rock River after he received his release from Dr. Baartman. (Tr., p. 32) Badillo testified Rock River did not give him the opportunity to work. (Tr., p. 32)

During a follow-up appointment on March 23, 2018, Badillo complained of headaches, tearing of his eye when looking at the sun, and difficulty sleeping because his eye felt warm. (JE 3, p. 7) Dr. Baartman documented Badillo could return to full duty and that he should wear safety glasses at all times. (JE 2, p. 5)

Badillo attended additional appointments with Vance Thompson Vision, complaining about his left eye, reporting he was experiencing pain, headaches, tearing, itchiness, and problems sleeping. (JE 3, pp. 11-25) Badillo testified he remained under continual care from physicians between March 2018 and June 2018. (Tr., p. 32) Badillo reported Rock River did not give him any work and he believed he had been terminated. (Tr., pp. 32-33)

Badillo alleges he started work with Vander Pol on June 11, 2018. (Tr., pp. 33, 66) This is contradicted by the record evidence. Badillo completed an Employee Information Sheet for Vander Pol Excavating, LLC ("Vander Pol"), on March 23, 2018, for a paver position. (Ex. G, p. 1) According to his employment records from Vander Pol, Badillo was hired on March 23, 2018, as a full-time seasonal employee, and he commenced his employment on March 26, 2018, earning \$20.00 per hour. (Ex. K, p. 1) A note from his employer, Vander Pol, documents "Badillo hasn't worked since 4/10/18 (worked 4/9/2018). Had an injury to his eye at previous job . . . they put him in the hospital a couple of days (10-11th?) & now he is 'missing in action' – they can't get him to answer his phone." (Ex. L, p. 1) When questioned about this document at hearing, Badillo responded "I cannot respond to that is what she is saying, I can't contradict that." (Tr., pp. 68-69) I do not find Badillo's testimony that he did not find work until June 11, 2018 reasonable or consistent with the other evidence I believe. The evidence supports Badillo commenced work with Vander Pol before June 11, 2018, on March 26, 2018.

Badillo received additional follow-up care from Vance Thompson Vision, complaining of blurry vision, discomfort, and a burning sensation in his left eye. (JE 3, pp. 27-38) On September 6, 2018, John Stephens, M.D., wrote a letter to Jeffrey Oakland, O.D., noting Vance Thompson Vision had been treating Badillo "for a somewhat complicated course for his left eye." (JE 3, p. 39) Dr. Stephens noted Badillo sustained a left eye ruptured globe, which was repaired, he developed fungal keratitis, which had resolved, and Badillo had a "significant left corneal scar and a pterygium in the left eye." (JE 3, p. 39) Dr. Stephens referred Badillo for a pair of glasses and noted Badillo would be fitted in a few weeks for a scleral lens. (JE 3, p. 39) Badillo received additional follow-up care with Vance Thompson Vision, reporting his vision had not changed and noting he was experiencing a burning sensation in his left eye and headaches. (JE 3, pp. 40-45)

Jacqueline Stoken, M.D., a physiatrist, conducted an independent medical examination for Badillo on May 22, 2019, and issued her report on June 3, 2019. (Ex. 1) Dr. Stoken reviewed Badillo's medical records and examined him. (Ex. 1) Dr. Sassman listed an impression of a history of a left elbow fracture in 1990, history of bilateral leg fractures on or about 1989, status post left eye injury with left corneal laceration with uveal prolapse on or about January 2018, status post repair of corneal laceration, left eye on January 31, 2018, with a postoperative diagnosis of left corneal laceration five millimeters in length with uveal prolapse, status post anterior vitrectomy with lens removal and intraocular lens in the left eye on February 26, 2018, with a postoperative diagnosis of a ruptured globe, status post repair, left eye, hypermature cataract with a ruptured anterior capsule, anterior synechia to wound, and left corneal

scar with pterygium with impaired vision of the left eye with chronic eye pain. (Ex. 1, p. 6)

Dr. Stoken opined the metal strap snapping and hitting Badillo's left eye caused his left eye injury. (Ex. 1, p. 7) Dr. Stoken assigned an impairment rating using the Guides to the Evaluation of Permanent Impairment (AMA Press, 5th Ed. 2001) ("AMA Guides"), as follows:

Clinical studies: Best corrected acuities:

VOU: 20/25, VOD: 20/20, VOS 2/500

Functional Acuity Score: Using table 12-2, page 284, to determine the Visual Acuity Score for each eye; using Table 12-3 to combine the values to a Functional Acuity Score:

VOU Unknown

VOD 20/20 $100 \times 1 = 100$

VOS 20/400 $30 \times 1 = 30$

Add OU, OD & OS 130

Functional Acuity Score = $130/2 = 65$

Impairment Rating: $100-65 = 35\%$ Visual Impairment.

(Ex. 1, p. 7) Dr. Stoken assigned no impairment rating for the 1989 injury to Badillo's right lower extremity or for the 1990 injury to his left upper extremity, finding Badillo had full range of motion for both extremities. (Ex. 1, p. 7)

In his answers to interrogatories propounded by the Fund, Badillo claimed two first injuries to his bilateral lower extremities in 1988 and to his left upper extremity in 1991. (Ex. 6, p. 26) With respect to his bilateral lower extremities injury from 1988, Badillo reported his knees are stiff when he wakes up, his knees have become more of an issue because of stiffness and immobility, and he experiences sensations in his knees when kneeling and getting up and down at work, which makes his job more difficult. (Ex. 6, p. 26) With respect to his left upper extremity injury, Badillo reported cold weather bothers his left elbow and at times he will have pain, numbness, and tingling in his left elbow. (Ex. 6, p. 26)

During the hearing Badillo reported following his left eye injury he began experiencing headaches. (Tr., p. 27) Badillo testified he experiences intense, deep pain in his left eye, including the area surrounding his left eye and around the top of his head, which sometimes goes down into his cheek. (Tr., pp. 29-30) Badillo reported he experiences headaches every day. (Tr., p. 63)

Badillo continued to work for Vander Pol at the time of the hearing, working forty-five hours per week, and earning \$21.00 per hour. (Tr., pp. 34-35, 52) Badillo reported his coworkers at Vander Pol help him lift things because when he bends over he gets a headache. (Tr., p. 35) During the hearing Badillo requested medical care for treatment of his headaches. (Tr., p. 36)

Badillo testified as a child his brother hurt his leg and he sometimes has pain in his right leg. (Tr., pp. 36-37) Badillo has not sought treatment for his right leg from any physician or hospital in the United States. (Tr., p. 60)

Badillo reported he also injured his left arm, requiring surgery and placement of a plate in his arm when he was twelve and living in Mexico. (Tr., pp. 37-38) Badillo has not sought treatment for his left arm in the United States. (Tr., pp. 60-61) Badillo testified “[w]ell, it wasn’t hurting but now it’s been hurting more but it depends on well, well, how a person treats his or her body” and reported his left arm is not as strong as his right arm and he cannot stretch it out the same way. (Tr., p. 38)

CONCLUSIONS OF LAW

I. Applicable Law

This case involves several issues, including nature and extent of disability, entitlement to temporary benefits, recovery of medical bills, recovery of the cost of an independent medical examination, recovery of costs, entitlement to benefits from the Fund, and interest under Iowa Code sections 85.27, 85.33, 85.34, 85.39, 85.40, 85.34, 85.64, and 535.3. In 2017, the Iowa Legislature enacted changes to Iowa Code chapters 85, 86, and 535 effecting workers’ compensation cases. 2017 Iowa Acts chapter 23 (amending Iowa Code sections 85.16, 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.45, 85.70, 85.71, 86.26, 86.39, 86.42, and 535.3). Under 2017 Iowa Acts chapter 23 section 24, the changes to Iowa Code sections 85.18, 85.23, 85.26, 85.33, 85.34, 85.39, 85.71, 86.26, 86.39, and 86.42 apply to injuries occurring on or after the effective date of the Act. This case involves an injury occurring after July 1, 2017, therefore, the provisions of the new statute involving nature and extent of disability and the recovery of the cost of an independent medical examination under Iowa Code sections 85.33, 85.34, and 85.39 apply to this case.

The calculation of interest is governed by Sanchez v. Tyson, File No. 5052008 (Ruling on Defendant’s Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue), which holds interest for all weekly benefits payable and not paid when due which accrued before July 1, 2017, is payable at the rate of ten percent; all interest on past due weekly compensation benefits accruing on or after July 1, 2017, is payable at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Again, given this case concerns an injury occurring after July 1, 2017, the new provision on interest applies to this case.

II. Nature of the Injury

Badillo alleges he sustained a permanent impairment to his left eye and headaches caused by the work injury, entitling him to industrial disability benefits. Rock River and Hastings reject his assertion and contend Badillo has only sustained a permanent impairment to his left eye causally related to the work injury, and his disability should be compensated as a scheduled loss.

To receive workers' compensation benefits, an injured employee must prove, by a preponderance of the evidence, the employee's injuries arose out of and in the course of the employee's employment with the employer. 2800 Corp. v. Fernandez, 528 N.W.2d 124, 128 (Iowa 1995). An injury arises out of employment when a causal relationship exists between the employment and the injury. Quaker Oats v. Ciha, 552 N.W.2d 143, 151 (Iowa 1996). The injury must be a rational consequence of a hazard connected with the employment, and not merely incidental to the employment. Koehler Elec. v. Willis, 608 N.W.2d 1, 3 (Iowa 2000). The Iowa Supreme Court has held, an injury occurs "in the course of employment" when:

it is within the period of employment at a place where the employee reasonably may be in performing his duties, and while he is fulfilling those duties or engaged in doing something incidental thereto. An injury in the course of employment embraces all injuries received while employed in furthering the employer's business and injuries received on the employer's premises, provided that the employee's presence must ordinarily be required at the place of the injury, or, if not so required, employee's departure from the usual place of employment must not amount to an abandonment of employment or be an act wholly foreign to his usual work. An employee does not cease to be in the course of his employment merely because he is not actually engaged in doing some specifically prescribed task, if, in the course of his employment, he does some act which he deems necessary for the benefit or interest of the employer.

Farmers Elevator Co. v. Manning, 286 N.W.2d 174, 177 (Iowa 1979) (quoting Bushing v. Iowa R. & Light Co., 208 Iowa 1010, 1018, 226 N.W. 719, 723 (1929)).

The claimant bears the burden of proving the claimant's work-related injury is a proximate cause of the claimant's disability and need for medical care. Ayers v. D & N Fence Co., Inc., 731 N.W.2d 11, 17 (Iowa 2007); George A. Hormel & Co. v. Jordan, 569 N.W.2d 148, 153 (Iowa 1997). "In order for a cause to be proximate, it must be a 'substantial factor.'" Ayers, 731 N.W.2d at 17. A probability of causation must exist, a mere possibility of causation is insufficient. Frye v. Smith-Doyle Contractors, 569 N.W.2d 154, 156 (Iowa Ct. App. 1997).

The question of medical causation is "essentially within the domain of expert testimony." Cedar Rapids Cmty. Sch. Dist. v. Pease, 807 N.W.2d 839, 844-45 (Iowa 2011). The deputy commissioner, as the trier of fact, must "weigh the evidence and

measure the credibility of witnesses.” Id. The trier of fact may accept or reject expert testimony, even if uncontroverted, in whole or in part. Frye, 569 N.W.2d at 156. When considering the weight of an expert opinion, the fact-finder may consider whether the examination occurred shortly after the claimant was injured, the compensation arrangement, the nature and extent of the examination, the expert’s education, experience, training, and practice, and “all other factors which bear upon the weight and value” of the opinion. Rockwell Graphic Sys., Inc. v. Prince, 366 N.W.2d 187, 192 (Iowa 1985).

Dr. Sassman is the only physician to provide an opinion on causation and permanency in this case. Dr. Sassman listed an impression of a history of a left elbow fracture in 1990, history of bilateral leg fractures on or about 1989, status post left eye injury with left corneal laceration with uveal prolapse on or about January 2018, status post repair of corneal laceration, left eye on January 31, 2018, with a postoperative diagnosis of left corneal laceration five millimeters in length with uveal prolapse, status post anterior vitrectomy with lens removal and intraocular lens in the left eye on February 26, 2018, with a postoperative diagnosis of a ruptured globe, status post repair, left eye, hypermature cataract with a ruptured anterior capsule, anterior synechia to wound, and left corneal scar with pterygium with impaired vision of the left eye with chronic eye pain. (Ex. 1, p. 6) Dr. Sassman did not list an impression or diagnosis of headaches in her report or find the work injury caused headaches or any other condition. (Ex. 1) Dr. Sassman only assigned an impairment rating for Badillo’s left eye. Badillo has established he sustained a permanent impairment to his left eye caused by the January 2018 work injury. Badillo has not established he sustained an injury to his body as a whole caused by the January 2018 work injury.

III. Extent of Disability

Permanent partial disabilities are divided into scheduled and unscheduled losses. Iowa Code § 85.34(2). If the claimant’s injury is listed in the specific losses found in Iowa Code section 85.34(2)(a)-(u), the injury is a scheduled injury and is compensated by the number of weeks provided for the injury in the statute. See Second Injury Fund v. Bergeson, 526 N.W.2d 543, 547 (Iowa 1995) (under earlier version of Iowa Code section 85.34). “The compensation allowed for a scheduled injury ‘is definitely fixed according to the loss of use of the particular member.’” Id. (quoting Graves v. Eagle Iron Works, 331 N.W.2d 116, 118 (Iowa 1983)). If the claimant’s injury is not listed in the specific losses in the statute, compensation is paid in relation to 500 weeks as the disability bears to the body as a whole. Iowa Code § 85.34(2)(v). “Functional disability is used to determine a specific scheduled disability; industrial disability is used to determine an unscheduled injury.” Bergeson, 526 N.W.2d at 547. Under the schedule, the compensation for loss of an eye is 140 weeks. Iowa Code § 85.34(2)(q).

Iowa Code section 85.34(2)(x) provides when determining functional disability under Iowa Code section 85.34(2)(q), “the extent of loss or percentage of permanent impairment shall be determined solely by utilizing” the AMA Guides adopted by the Commissioner in rule 876 Iowa Administrative Code 2.4. The statute prohibits use of

agency expertise or lay testimony in determining functional disability under the schedule. Iowa Code § 85.34(2)(x).

Dr. Stoken assigned Badillo a thirty-five percent visual impairment. (Ex. 1, p. 7) Dr. Stoken is the only physician who provided an impairment rating in this case. Her opinion is un rebutted. Rock River and Hastings did not obtain an impairment rating. Given I am prohibited from using my expertise or considering lay testimony in analyzing functional disability in this case, I must adopt Dr. Sassman's un rebutted opinion. Id. Badillo is entitled to forty-nine weeks of permanent partial disability benefits, at the stipulated rate of \$229.53 per week, commencing on June 3, 2019, the date Dr. Sassman issued her report. Iowa Code § 85.34(2) (compensation for a permanent partial disability commences "when it is medically indicated that maximum medical improvement from the injury has been reached and that the extent of loss or percentage of permanent impairment can be determined" under the AMA Guides). Rock River and Hastings are entitled to a credit for all benefits paid as set forth in Exhibit B.

IV. Healing Period Benefits

Iowa Code section 85.33 (2018) governs temporary disability benefits, and Iowa Code section 85.34 governs healing period and permanent disability benefits. Dunlap v. Action Warehouse, 824 N.W.2d 545, 556 (Iowa Ct. App. 2012).

An employee has a temporary partial disability when because of the employee's medical condition, "it is medically indicated that the employee is not capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, but is able to perform other work consistent with the employee's disability." Iowa Code § 85.33(2). Temporary partial disability benefits are payable, in lieu of temporary total disability and healing period benefits, due to the reduction in earning ability as a result of the employee's temporary partial disability, and "shall not be considered benefits payable to an employee, upon termination of temporary partial or temporary total disability, the healing period, or permanent partial disability, because the employee is not able to secure work paying weekly earnings equal to the employee's weekly earnings at the time of injury." Id.

As a general rule, "temporary total disability compensation benefits and healing-period compensation benefits refer to the same condition." Clark v. Vicorp Rest., Inc., 696 N.W.2d 596, 604 (Iowa 2005). The purpose of temporary total disability benefits and healing period benefits is to "partially reimburse the employee for the loss of earnings" during a period of recovery from the condition. Id. The appropriate type of benefit depends on whether or not the employee has a permanent disability. Dunlap, 824 N.W.2d at 556. The parties stipulated Badillo sustained a permanent impairment, therefore, if he is entitled to additional temporary benefits, Badillo is entitled to healing period benefits.

Iowa Code section 85.34(1) governs healing period benefits, as follows:

the employer shall pay to the employee compensation for a healing period, as provided in section 85.37, beginning on the first day of disability after the injury, and until the employee has returned to work or it is medically indicated that significant improvement from the injury is not anticipated or until the employee is medically capable of returning to employment substantially similar to the employment in which the employee was engaged at the time of injury, whichever occurs first.

Rock River and Hastings paid Badillo healing period benefits from February 1, 2018 through March 5, 2018, at the rate of \$242.64 per week. (Ex. B) The parties stipulated Badillo's actual rate is \$229.53. Badillo seeks healing period benefits from January 31, 2018 through June 11, 2018. Rock River and Hastings contend Badillo is not entitled to any additional healing period benefits.

On March 2, 2018, Dr. Baartman released Badillo to return to work without restrictions on March 6, 2018. (JE 3, p. 5) There is no evidence Rock River offered Badillo work commencing on March 6, 2018. Dr. Baartman did not opine Badillo had reached maximum medical improvement on March 2, 2018, and Badillo continued to receive treatment for his left eye condition. Under the statute, Badillo's healing period did not end on March 5, 2018.

As indicated above, I do not find Badillo's testimony that he commenced work with Vander Pol in June 2018 reasonable and consistent with the other evidence I believe. The record evidence supports Badillo commenced full-time employment with Vander Pol on March 26, 2018, performing the same concrete work he performed for Wren's Concrete, working more hours and at a higher hourly rate than he earned for Rock River. When he commenced employment with Vander Pol, Badillo's healing period ended under the statute. Badillo did not present any evidence he was restricted from working due to his work injury after he commenced employment with Vander Pol on March 26, 2018. Badillo has established he is entitled to healing period benefits from January 31, 2018 through March 25, 2018.

V. Entitlement to Benefits through the Fund

Under Iowa Code section 85.64,

[i]f an employee who has previously lost, or lost the use of, one hand, one arm, one foot, one leg, or one eye, becomes permanently disabled by a compensable injury which has resulted in the loss of or loss of use of another such member or organ, the employer shall be liable only for the degree of disability which would have resulted from the latter injury if there had been no preexisting disability. In addition to such compensation, and after the expiration of the full period provided by law for the payments thereof by the employer, the employee shall be paid out of the "Second

Injury Fund” created by this division the remainder of such compensation as would be payable for the degree of permanent disability involved after first deducting from such remainder the compensable value of the previously lost member or organ.

Thus, an employee is entitled to Fund benefits if the employee establishes: (1) the employee sustained a permanent disability to a hand, arm, foot, leg, or eye, a first qualifying injury; (2) the employee subsequently sustained a permanent disability to another hand, arm, foot, leg, or eye, through a work-related injury, a second qualifying injury; and (3) the employee has sustained a permanent disability resulting from the first and second qualifying injuries exceeding the compensable value of the “previously lost member.” Gregory v. Second Injury Fund of Iowa, 777 N.W.2d 395, 398-99 (Iowa 2010).

Badillo alleges he sustained two first qualifying losses, an injury to his right leg as a child, and an injury to his left arm as a child. Badillo has not sought medical care for either injury since moving to the United States. (Tr., pp. 60-61) During the hearing Badillo reported his left arm is not as strong as his right arm and he cannot stretch it out in the same way. (Tr., p. 38) This is contrary to Dr. Sassman’s finding Badillo had full range of motion for both extremities. (Ex. 1, p. 7) Dr. Sassman examined Badillo and assigned no impairment rating for his right lower extremity or his left upper extremity. (Ex. 1, p. 7) There is no evidence Badillo requested accommodations from any employer for the alleged injuries. Badillo has not established he sustained a first qualifying injury to his right lower extremity or to his left upper extremity. He is not entitled to benefits from the Fund.

VI. Medical Bill

Badillo seeks to recover the cost of a \$70.00 bill from Driesen Eye Center from December 1, 2018. (Ex. 4, p. 19) The parties did not address the medical bill in their post-hearing briefs.

An employer is required to furnish reasonable surgical, medical, dental, osteopathic, chiropractic, podiatric, physical rehabilitation, nursing, ambulance, hospital services and supplies, and transportation expenses for all conditions compensable under the workers’ compensation law. Iowa Code § 85.27(1). The employer has the right to choose the provider of care, except when the employer has denied liability for the injury. Id. “The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee.” Id. § 85.27(4). If the employee is dissatisfied with the care, the employee should communicate the basis for the dissatisfaction to the employer. Id. If the employer and employee cannot agree on alternate care, the commissioner “may, upon application and reasonable proofs of the necessity therefor, allow and order other care.” Id. The statute requires the employer to furnish reasonable medical care. Id. § 85.27(4); Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (noting “[t]he employer’s obligation under the statute turns on the question of reasonable necessity, not desirability”). The Iowa Supreme Court has held

the employer has the right to choose the provider of care, except when the employer has denied liability for the injury, or has abandoned care. Iowa Code § 85.27(4); Bell Bros. Heating & Air Conditioning v. Gwinn, 779 N.W.2d 193, 204 (Iowa 2010). No information was provided concerning the medical bill at hearing. Badillo is not entitled to recover the \$70.00 medical bill from Driesen Eye Center.

VII. Independent Medical Examination

Badillo seeks to recover the \$2,000.00 cost of Dr. Stoken's independent medical examination. (Ex. 1, p. 7) Rock River and Hastings aver Badillo is not entitled to recover the cost of the examination and the Fund avers costs may not be assessed against the Fund.

Iowa Code section 85.39(2) (2018), provides:

2. If an evaluation of permanent disability has been made by a physician retained by the employer and the employee believes this evaluation to be too low, the employee shall, upon application to the commissioner and upon delivery of a copy of the application to the employer and its insurance carrier, be reimbursed by the employer the reasonable fee for a subsequent examination by a physician of the employee's own choice, and reasonably necessary transportation expenses incurred for the examination. . . . An employer is only liable to reimburse an employee for the cost of an examination conducted pursuant to this subsection if the injury for which the employee is being examined is determined to be compensable under this chapter or chapter 85A or 85B. An employer is not liable for the cost of such an examination if the injury for which the employee is being examined is determined not to be a compensable injury. A determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination is conducted.

No physician retained by Rock River or Hastings provided an impairment rating before Dr. Stoken conducted the independent medical examination for Badillo. Under the statute, Badillo is not entitled to recover the cost of Dr. Stoken's independent medical examination under Iowa Code section 85.39.

VIII. Costs

Badillo seeks to recover the \$100.00 filing fee and the \$2,000.00 cost of Dr. Sassman's independent medical examination and report. Iowa Code section 86.40 provides, "[a]ll costs incurred in the hearing before the commissioner shall be taxed in the discretion of the commissioner." Rule 876 Iowa Administrative Code 4.33(6), provides:

[c]osts taxed by the workers' compensation commissioner or a deputy commissioner shall be (1) attendance of a certified shorthand reporter or presence of mechanical means at hearings and evidential depositions, (2) transcription costs when appropriate, (3) costs of service of the original notice and subpoenas, (4) witness fees and expenses as provided by Iowa Code sections 622.69 and 622.72, (5) the costs of doctors' and practitioners' deposition testimony, provided that said costs do not exceed the amounts provided by Iowa Code sections 622.69 and 622.72, (6) the reasonable costs of obtaining no more than two doctors' or practitioners' reports, (7) filing fees when appropriate, (8) costs of persons reviewing health service disputes.

Dr. Sassman's bill is itemized. She charged \$800.00 for the exam and \$1,200.00 for the report. (Ex. 5, p. 21) The rule expressly allows for the recovery of the \$100.00 filing fee and for no more than two doctor's reports.

Dr. Sassman's report is eight pages long. The majority of the report pertains to Badillo's claim against Rock River and Hastings. I find three-fourths of the report, or \$800.00 should be assessed to Rock River and Hastings. Rock River and Hastings are not responsible for the portion of the report attributable to Badillo's claim against the Fund. Badillo was not successful in his claim against the Fund. And as noted by the Fund in its post-hearing brief, costs cannot be assessed to the Fund. Iowa Code §§ 85.64, 85.66; Hannan v. Second Injury Fund of Iowa, File No. 5052402 (App. July 25, 2018).

ORDER

IT IS THEREFORE ORDERED, THAT:

Defendants Rock River and Hastings shall pay the claimant forty-nine (49) weeks of permanent partial disability benefits at the stipulated weekly rate of two hundred twenty-nine and 53/100 dollars (\$229.53), commencing on June 3, 2019.

Defendants Rock River and Hastings shall pay the claimant healing period benefits from January 31, 2018 through March 25, 2018.

Defendants Rock River and Hastings are entitled to a credit for all benefits paid as set forth in Exhibit B.

Defendants Rock River and Hastings shall pay accrued weekly benefits in a lump sum together with interest at an annual rate equal to the one-year treasury constant maturity published by the federal reserve in the most recent H15 report settled as of the date of injury, plus two percent. Sanchez v. Tyson, File No. 5052008 (Apr. 23, 2018 Ruling on Defendant's Motion to Enlarge, Reconsider, or Amend Appeal Decision Re: Interest Rate Issue).

Defendants Rock River and Hastings shall reimburse the claimant one hundred and 00/100 dollars (\$100.00) for the filing fee, and eight hundred and 00/100 dollars (\$800.00) for Dr. Sassman's report.

Defendants shall file subsequent reports of injury as required by this agency pursuant to rules 876 IAC 3.1(2) and 876 IAC 11.7.

Signed and filed this 17th day of February, 2020.


HEATHER L. PALMER
DEPUTY WORKERS'
COMPENSATION COMMISSIONER

The parties have been served, as follows:

Tom L. Drew (via WCES)

Sara A. Lamme (via WCES)
Tiernan T. Siems (via WCES)

Meredith C. Cooney (via WCES)

Right to Appeal: This decision shall become final unless you or another interested party appeals within 20 days from the date above, pursuant to rule 876-4.27 (17A, 86) of the Iowa Administrative Code. The notice of appeal must be filed via Workers' Compensation Electronic System (WCES) unless the filing party has been granted permission by the Division of Workers' Compensation to file documents in paper form. If such permission has been granted, the notice of appeal must be filed at the following address: Workers' Compensation Commissioner, Iowa Division of Workers' Compensation, 150 Des Moines Street, Des Moines, Iowa 50309-1836. The notice of appeal must be received by the Division of Workers' Compensation within 20 days from the date of the decision. The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or legal holiday.